FILE COPY

IN THE

Supreme Court of the United States

October Term, 1938

No. 127

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,
Petitioner,

vs.

RADIO CORPORATION OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Most of respondent's arguments are completely refuted by the record, as pointed out by the petition for writ of certiorari. In consequence, this reply is confined to three topics, as to which respondent's brief is so flagrantly erroneous that comment thereon is necessary.

1. Respondent advances the argument to the effect that nothing in the world is further from its mind than to establish or enforce, by means of the patent here involved, a monopoly in the important industry of public service radio telegraph. In support of its argument to this effect respondent asserts (going outside of the record to do so) that, subsequent to the opinion of the Court of Appeals, it has offered petitioner a license under the patent in suit.

Although this is not of record, it is true; but we ask the Court's consideration of the terms of the license—viz.: *4½% of the* GROSS *revenue* of the licensee derived from its public service radio telegraph communication business (see the last long paragraph of Appendix B, p. 18 of respondent's brief). In other words, respondent brazenly *asserts* that it, as a condition precedent to the competition, seeks to levy a tribute of 4½% of the *gross* revenues of its only competitor in world-wide radio telegraph communication—and this on a patent which it elsewhere asserts in its brief is of extremely limited scope, and which patent the District Court found to be utterly worthless as to subject matter and invalid at law.

According to the published annual statement of petitioner for 1937, filed with the Federal Communications Commission, a levy of 4½% on petitioner's gross income ($1,026,318) would represent approximately 200% of its net income ($23,662)* for that year. Similarly, according to the published statement of respondent, Radio Corporation of America, for the same year, a levy of 4½% on respondent's gross revenue ($111,852,876) would represent over 55% of its net income ($9,024,858). It is obvious that no public service corporation could exist under such a burden. It is apparent therefore, on analysis, that respondent's plea that instead of trying to eliminate competition it is seeking to encourage it, is nothing more than a sham.

2. Respondent likewise goes outside of the record to refer to a license which it asserts it has granted, on the onerous terms above stated, to Globe Wireless, Ltd. The record discloses nothing about that concern. For all the record discloses it may be a subsidiary of respondent. If, in

* Exclusive of intercompany interest on borrowed capital.

fact, it has acquired a licence on the terms of 4½% of its *gross* revenues, it may well be that it is dominated or controlled by respondent. We know that Globe Wireless, Ltd, is *not* engaged in world-wide radio service, and in that field is *not* a competitor of petitioner. Because of that knowledge we assert that it is not a competitor of respondent in that field.

3. Respondent asserts that one of the members in the "Radio Trust", viz.: American Telephone and Telegraph Company, assisted petitioner at the trial of this cause (*e. g.*, see respondent's brief, p. 2). This is entirely untrue. The American Telephone and Telegraph Company, one of the parties to the radio patent pool, had relevant facts and documents in its possession. Petitioner demanded that these facts be made available for consideration by the Court in this case. That demand was complied with *after* the said facts had been made known to respondent by the American Telephone and Telegraph Company *prior* to the trial. Counsel for respondent had in his possession at the trial (and presumably for many days prior thereto) photostatic copies of all of the documentary exhibits which the employees of the American Telephone and Telegraph Company were required to produce.

Conclusion.

We submit as quite apparent that where a litigant is compelled to go to the extremes to which respondent is driven in its present brief in the foregoing instances to which we confine our comments, there must, indeed, be merit in the opposing cause sufficient to warrant, for the public interest, a review by this Court of the issues in controversy.

Therefore, the grant of the petition is most earnestly urged.

Respectfully submitted,

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